U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 23 September 2003

CASE NO.: **2002-LHC-2733**
2002-LHC-2734
2002-LHC-2735
2002-LHC-2736

OWCP NO.: **07-152742**
07-159245
07-153993
07-156700

IN THE MATTER OF

MECHELL D. BIVENS,
Claimant

v.

NORTHROP GRUMAN SHIP SYSTEMS,
Employer

APPEARANCES:

TOMMY DULIN, ESQ.
On behalf of the Claimant

PAUL M. FRANKE, JR., ESQ. and
SUSAN SEVEL, ESQ.
On behalf of the Employer

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Mechell D. Bivens (Claimant) against Northrop Grumman Ship Systems (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Gulfport, Mississippi, on June 25, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-6 and 8-10 and
3. Employer's Exhibits 1-28.

At the hearing, Employer objected to the admission of Claimant's Exhibit 7, an errata sheet completed by Claimant after her deposition in this case. According to Employer's post-hearing brief, the errata sheet contained substantive changes to answers given by Claimant in the deposition. Employer argued that such changes are not permitted by the Federal Rules of Civil Procedure and relevant case law. See Fed. R. Civ. P. 30(e). At the hearing, both Parties stipulated to the accuracy of the transcription of Claimant's deposition testimony. While recognizing the merit of Employer's argument, I note that administrative law judges, who are bound by their own rules of practice and procedure, are not necessarily bound by the Federal Rules of Civil Procedure, except in situations not provided for or controlled by these rules. See 29 C.F.R. § 18.1(a). In addition, an administrative law judge has great discretion concerning the admission of evidence. See Cooper v. Offshore Pipelines Int'l, Inc., et al, 33 BRBS 46, 51 (Apr. 28, 1999). Judges hearing cases under the Act are not bound by the Federal Rules of Evidence and may admit relevant evidence which might not otherwise be admissible under the Rules. See 29 C.F.R. § 18.001(b)(2). With that in mind, I hereby admit Claimant's Exhibit 7 into evidence and note that it will be evaluated within the context of both Claimant's deposition and hearing testimony, during which Employer's attorneys had the opportunity to cross-examine Claimant on all issues relating to the deposition and her subsequent answer changes on the errata sheet.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case Nos. 2002-LHC-02733/02734/02735/02736 (JX-1):

1. That Claimant's: First injury occurred on April 7, 1999;
   Second injury occurred on July 28, 1999;
   Third injury occurred on May 23, 2000; and
   Fourth injury occurred on June 28, 2000.

2. That the injuries were in the course and scope of Claimant's employment.

3. That jurisdiction of this claim is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

4. That an employer/employee relationship existed at the time of the injuries.

5. That Employer was timely advised of all four injuries.

6. That a timely Notice of Controversion was filed for all four injuries.

7. That compensation has been paid as follows:
   (a) Temporary total disability for Claimant's first injury: April 9, 1999, through May 27, 1999.
   Total compensation paid to date for first injury: $1,822.63.
   (b) Total medical expenses paid to date:
   First injury: $7,386.96
   Second injury: $5,651.73
   Third injury: $997.65

II. ISSUES

The unresolved issues in this proceeding are:

1. Nature and extent of Claimant's disability.

2. Periods of temporary total disability, permanent total disability and permanent partial disability, if any.

3. Average weekly wage.

4. Medical benefits.

5. Employer's credit for compensation and wages paid.

6. Attorney's fees.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a thirty-nine year old woman who resides in Moss Point, Mississippi. (Tr. 23-24). She is a high school graduate and a licensed cosmetologist. (Tr. 24). Her previous work experiences include jobs as a housekeeping aid at a local hospital, as a substitute teacher and as a worker at a glove factory. (Tr. 25). Claimant was fired from her hospital job. (Tr. 71).

In 1993, Claimant sustained a nose injury and a neck injury when her car was struck by a drunk driver. (Tr. 27). The case involving this accident was settled for $50,000, and Claimant was unable to work for over a year. (Tr. 67-68). Claimant acknowledged that on June 27, 1994, she asked her doctor to give her a piece of paper stating that she was incapable of doing manual labor. (Tr. 82).

When Claimant began working as an apprentice pipe fitter for Employer in January 1998, she underwent on-the-job training for her position. (Tr. 25-26). This training consisted of classes at a junior college along with weekly tests. (Tr. 28). Claimant passed a pre-employment physical before beginning work for Employer. The examination involved a physical test, a drug test and vision and hearing tests. (Tr. 26-27). Claimant testified that despite her previous physical injuries, she felt that she could perform the job. (Tr. 78). Claimant stated that in her first year of employment as an apprentice pipe fitter, she worked five days a week as a full time employee and also worked overtime. (Tr. 28). During the time prior to her first workplace accident, Claimant never received any written warnings or disciplinary suspensions and was never laid off. (Tr. 28-29). She also received raises during this time. (Tr. 29-30).

On April 7, 1999, Claimant was injured at work when a ten foot carbon steel pipe fell on her from behind, striking her head, neck, left shoulder and back. (Tr. 30). Claimant's body went numb and she was unable to move for about five or ten minutes. (Tr. 31). Claimant stopped working and told her supervisor what had happened. (Tr. 31-32). Claimant went to the emergency room that evening. (Tr. 32). On the next day, Claimant went to the shipyard hospital and then to see her family physician, Dr. Reginald Stewart. (Tr. 33). Claimant's treatment with Dr. Stewart was covered by workers' compensation. According to Claimant, Dr. Stewart told her not to return to shipyard labor because of the risk that she would re-injure herself. (Tr. 34). Claimant also treated with Dr. John Cope, an orthopedic specialist. He prescribed medication, took an MRI and sent Claimant to physical therapy. Claimant testified that Dr. Cope took her off work for three or four weeks. Her treatment with Dr. Cope was also approved by workers' compensation. (Tr. 35).

After Dr. Cope released Claimant to light duty in May 1999, she returned to the shipyard during a strike and crossed the picket line to see her supervisor. Claimant returned to work again after the strike was over. In the interim, Employer's insurer sent Claimant to Dr. William Crotwell for one visit. (Tr. 37). Dr. Crotwell placed light duty restrictions on Claimant, including no lifting, no overhead work and no bending. (Tr. 39). Claimant denied that she discussed her 1993 car accident and injuries with Dr. Crotwell. (Tr. 69-71). She denied telling Dr. Crotwell that her workplace injury occurred when she was hit with a four inch steel beam, approximately six inches long. (Tr. 87). Claimant testified that Dr. Crotwell never told her that he thought she was borderline malingering or magnifying her symptoms. (Tr. 84).

On July 27, 1999, Claimant returned to work on a ship, where she unbolted valves, picked them up and removed them from the ship. (Tr. 38-39). Although these tasks were within Claimant's restrictions, she began to experience pain while working and went to the shipyard hospital on July 28. (Tr. 39-40). On that same day, Dr. Crotwell released Claimant to regular duty. Claimant did not return to work that day. (Tr. 40). Wendy Gruich, the manager of health services, informed Claimant that she had tested positive for drugs. (Tr. 41). On July 29, 1999, Claimant saw Dr. Stewart and told him about the positive drug test. Claimant testified that Dr. Stewart told her not to return to work at the shipyard, as the labor was too demanding for her. On August 5, Claimant returned to the shipyard and took another drug test, which came up negative.

Claimant remained off work for nearly nine months before returning. (Tr. 42). During this time, she received physical therapy and was prescribed different medications by Dr. Stewart. According to Claimant, she suffered neck and shoulder spasms on her left side as well as swelling. Eventually, Dr. Stewart released Claimant to the care of Dr. Jeffrey Laseter, a chronic pain specialist. (Tr. 43). Dr. Laseter, whose treatment of Claimant was approved by workers' compensation, prescribed pain medication and set up a home stimulation program for Claimant. (Tr. 44; CX. 16, p. 4). Dr. Laseter then referred Claimant back to Dr. Stewart. (Tr. 44). Claimant testified that Dr. Stewart never told her that her official diagnosis was fibromyalgia or that her symptoms were disproportionate to her workplace injury. (Tr. 85-86).

Although Dr. Stewart never returned Claimant to work, she did eventually return sometime in 2000 after undergoing a functional capacity evaluation (FCE) at the insurance company's behest. (Tr. 44-45). Claimant testified that she was unable to complete the FCE because of the pain. (Tr. 45). Claimant was assigned a light duty job in which she rode a bicycle and transported pipes around the shipyard. (Tr. 46). Claimant remained at this job until May 23, 2000, when she began experiencing pain and stopped work to go to the shipyard hospital. Claimant received no treatment at the hospital. (Tr. 47).

Claimant later went to see Dr. M.F. Longnecker because she had severe left shoulder pain. (Tr. 47-48). Dr. Longnecker took an X-ray of Claimant's shoulder and prescribed some medication. His treatment of Claimant was approved by workers' compensation. Claimant remained off work for about ten days, until Dr. Longnecker returned her to regular duty. Claimant testified that Dr. Longnecker told her that she should stop working at the shipyard or her injuries would continue to recur. (Tr. 48, 87). According to Claimant, Dr. Longnecker never told her that there was nothing wrong with her other than soft tissue injuries or that he thought her injuries were somewhat exaggerated. (Tr. 83).

Claimant estimated that she returned to work sometime in June 2000. (Tr. 49). Her duties included cutting pipes, installing pipes and doing general pipe fitting work. Claimant stated that although she had difficulties doing the job, she continued to do her best to perform her tasks. (Tr. 50). On June 28, 2000, Claimant was using a buckeye machine to cut some pipe when she felt a pain in her arms and back which caused her to cut her left index finger. (Tr. 50-51). Claimant reported the accident to her supervisor and went to the shipyard hospital, where Dr. Zolinsky stitched up her finger. (Tr. 51-52).

Claimant was put on ten days light duty, and she continued to work until it was time for her stitches to be removed. While Claimant was at the hospital having her stitches removed, another drug test was taken, and Claimant again came up positive for drug use. (Tr. 52). At that point, Claimant had to leave work, and she went to another facility, where she underwent a second drug test, which came up negative. (Tr. 52-53). Claimant testified that she did not consume any substances between the time of the first and second drug tests. (Tr. 53). After speaking to her union representative, Claimant had a meeting at the shipyard on July 10, 2000. (Tr. 53-54). Despite the results of Claimant's second drug test, Employer decided to terminate her. (Tr. 54). Claimant has not returned to work for Employer since that time, nor has Employer offered her any full duty or light duty work. (Tr. 54, 57).

Claimant began working as a substitute teacher in September 2000. She has no teaching certificate or license. She substitutes for all grades and is paid $45 per day. (Tr. 56). Claimant works four or five days a week, year round, substitute teaching. (Tr. 57, 89). She does not have to do any lifting, bending or overhead work. (Tr. 57). Claimant estimated that she makes about $225 per week. (Tr. 89).

Claimant continues to treat with Dr. Stewart, but workers' compensation no longer covers this treatment. (Tr. 57). Claimant currently takes pain medication and muscle relaxers. She does not know whether workers' compensation pays for these prescriptions, but she has never paid for them herself. Claimant does not have health insurance through her teaching job. (Tr. 58).

In August 2002, Claimant was involved in a car accident in which she was rear-ended by another driver. (Tr. 58-59). Claimant sustained neck injuries and was treated and released at a local hospital. (Tr. 60). Claimant went to physical therapy for three weeks after the accident. She paid her medical bills relating to this incident. (Tr. 61).

Claimant testified that she knew little about Employer's drug testing program. (Tr. 61). She did not know whether there was a limit on how many times she could be tested for drugs, nor did she know how many times she could test positive for drugs before being laid off or terminated. (Tr. 61-62). Claimant affirmed that after her initial positive drug test, she was laid off for the first and only time. (Tr. 62-63).

Claimant testified that she continues to experience pain today from her workplace injuries. Although she is a licensed cosmetologist, she is unable to do

hair. (Tr. 64). Claimant testified that she does not use any illegal drugs and that she did not consume any marijuana during the time she was employed at the shipyard. (Tr. 65).

Claimant affirmed that she filled out an errata sheet after giving her deposition testimony. She testified that the purpose of these changes was to clarify her yes and no answers and to explain certain answers. (Tr. 63).

Testimony of Wendy Gruich

Ms. Gruich is the manager of health services for Employer. She has been employed with Employer's medical department since 1989. (Tr. 91).

Each new employee goes through an orientation program which includes a briefing on Employer's safety and drug-free workplace policies. (Tr. 93). The employees are given an employee manual on drug and alcohol abuse. The employees must sign and turn in a form acknowledging that they underwent training and received the manual. (Tr. 94). If an employee is out from work for longer than ninety days for any reason, the employee is subject to a drug test, medical, physical and hearing tests upon return to work. (Tr. 95).

The first time that an employee tests positive for drugs, the employee is sent home for up to six weeks on non-industrial medical leave and has the option of taking drug tests each week until the test comes up negative. At that point, the employee can return to work, subject to a one-year probationary period which includes six random, unannounced tests. If the employee tests positive for drugs at any time during the probationary period, the employee is terminated. (Tr. 97).

When an employee is drug tested, he must first show positive proof of identification. Paperwork is then filled out in the collection site area. (Tr. 97). Once the urine specimen is voided and the temperature is checked, the specimen is separated into two samples, each sealed with identifying tape containing the same bar code number. The donor and the sample taker each sign a form to certify that the specimen has been collected, labeled and sealed in accordance with requirements. (Tr. 98-99, 134). At that point, one sample goes to the onsite laboratory for the initial screening. The other sample is stored in a locked refrigerator in the lab until it is picked up by a courier who then delivers it to Kroll Laboratories, an outside lab. (Tr. 118, 135). Only two operators, who are certified to test the samples, have access to the specimens in the onsite lab. (Tr. 118-19).

The temperature of the specimen is important because it verifies that the sample belongs to the donor, rather than a third party. (Tr. 105). If the drug test is negative, the employee is allowed to return to work. (Tr. 105). A positive result in the initial screening is considered presumptively positive until confirmed by the GCMS method. (Tr. 100). According to Ms. Gruich, the GCMS method is "the gold standard of confirmation." (Tr. 112). In the case of marijuana, for example, the initial screen shows all marijuana metabolites at 50 nanograms or above. The GCMS confirmation identifies the presence of a specific marijuana metabolite, Delta 9 carboxy acid, at 15 nanograms or above. (Tr. 101). Ms. Gruich testified that Employer has never used the EMIT method of drug testing because in the 1980s, when Employer began its drug testing program, the EMIT method had problems with cross-reactivity, such that a person using ibuprofen might test positive for drugs. (Tr. 111).

When an employee tests positive for drugs and the initial results are confirmed by a confirmation test, Employer's Substance Abuse Review Committee reviews all the test results and checks to make sure that all procedures for collecting the sample and reporting the results conform to company policy. Once the committee ascertains that the procedures were followed correctly, the employee's case is referred to Labor Relations for disciplinary action. (Tr. 92). At that point, the employee may pursue a grievance with Labor Relations. The employee is allowed to have union representation during the grievance process. (Tr. 96). If the Substance Abuse Review Committee determines that the employee has violated a company policy, the employee must be discharged without exception. (Tr. 101).

Ms. Gruich testified that Employer has administered about 42,000 drug tests since it began testing employees in 1988. At the particular facility where Claimant was employed, about 500 employees have been found by the Substance Abuse Review Committee to have violated the drug policy, mandating their dismissal. (Tr. 102). According to Ms. Gruich, none of those drug screens have produced an erroneous result. (Tr. 116). She pointed out that employees with positive drug tests are not terminated until they have tested positive more than once. Ms. Gruich testified that while some employees may have challenged the results of their drug tests, none of them have been successful in proving that their test results were erroneous. (Tr. 117).

Ms. Gruich testified that Claimant underwent a post-accident drug screen on July 28, 1999. (Tr. 105-06). The initial screening test came up positive for marijuana, and the result was confirmed by GCMS in the outside lab used by

Employer. (Tr. 106). According to Ms. Gruich, the GCMS reported 41 nanograms of Delta 9 carboxy acid, which is "pretty high," since the cut-off level is 15 nanograms. (Tr. 114-15). Ms. Gruich did not know Claimant's height and weight at that time. She explained that each person's body breaks down marijuana at a different rate, so there is no set way to determine how long it takes the substance to dissipate from a person's system. For example, a person can smoke marijuana on the day of a drug test and not test positive until fourteen days later. (Tr. 115).

After Claimant tested positive for marijuana, she was placed on a non-industrial leave of absence and was given six weeks to come up clean on a second drug test. (Tr. 106). Ms. Gruich testified that she was the one who informed Claimant of her test results, but she did not recall whether Claimant disagreed with the results. (Tr. 124). One week later, on August 4, 1999, Claimant tested negative for drugs and was allowed to return to work. (Tr. 106-07). Claimant was then told that she would be on probation for the next twelve months, during which time she would be subject to six unannounced drug tests. If Claimant tested positive for drugs, she would be subject to disciplinary action up to and including termination. (Tr. 107). Ms. Gruich testified that it was possible for Claimant to test negative for marijuana seven days after testing positive. (Tr. 115).

On May 15, 2000, Claimant returned to work after a leave of absence which had lasted more than 90 days, so she was required to take a drug test. This test was negative for drugs. (Tr. 107). On July 11, 2000, Claimant was called in to take a random drug test as per her probation. (Tr. 107-08). The initial screening was presumptively positive for marijuana, which was confirmed through GCMS by the outside lab, LSI. (Tr. 108, 120). There is no common ownership interest between Employer and LSI. (Tr. 121). The equipment used to test Claimant's specimen was calibrated on June 16, 2000, nearly a month before her test. Ms Gruich testified that the operators who perform the tests also perform the calibrations on the equipment. (Tr. 120).

When drug testing an employee, the operators ask whether the employee is on any prescription medication, but the medication only becomes an issue if the employee tests positive for a substance such as opiates or barbituates. (Tr. 135-36). Neither Ms. Gruich nor any of her staff ever contacted Dr. Stewart, Claimant's treating physician, after her positive drug tests to discuss the possibility of a cross-reaction with Claimant's medication. Ms. Gruich explained that Dr. Warfield, the facility physician, would contact a treating physician if an employee tested positive for certain kinds of drugs, but since marijuana did not fall into that

category, there was no reason to contact Dr. Stewart after Claimant's drug tests. (Tr. 121).

Claimant's meeting with the Substance Abuse Review Committee took place on July 14, 2000. (Tr. 103). At that meeting, the committee determined that all procedural policies had been followed and recommended disciplinary action. (Tr. 104). Although Claimant filed a grievance with the union, Employer ultimately upheld the committee's decision. (Tr. 108). Ms. Gruich did not participate in either the Labor Relations process or the union grievance process in Claimant's case. (Tr. 119).

Ms. Gruich affirmed that she has seen a copy of Claimant's July 10, 2000 negative drug test results from American Family Care Medical Center. (Tr. 124). She testified that Employer sent an undercover investigator to this facility to test their drug screening procedures. When the investigator went into the bathroom to give a sample, he did not produce his own sample but instead poured another person's specimen into the cup. (Tr. 129). The investigator was not monitored when he gave the sample nor was he asked to show positive proof of identification. Ms. Gruich theorized that the drug test at this facility was probably done by dipstick testing rather than by use of diagnostic testing equipment. (Tr. 130). She explained that with a dipstick test a person must have a high concentration of marijuana in his system to test positive. (Tr. 131). She did not know whether Employer's investigators ever conducted an investigation of any other laboratories or if the police were ever involved with this sting operation. (Tr. 132).

Medical Records of John McCloskey, M.D.

Dr. McCloskey, a neurosurgeon, treated Claimant in the year after her 1993 car accident. (CX. 9). By October 28, 1994, Claimant had made no progress, although Dr. McCloskey had found nothing wrong with her. Dr. McCloskey concluded that there was nothing more that he could do for Claimant and that she should seek a second opinion. (CX. 9, p. 31).

Medical Records of Reginald Stewart, M.D.

Claimant began seeing Dr. Stewart, an internal medicine physician, after her 1993 car accident. (CX. 10, p. 24). In the fall of 1994, Dr. Stewart diagnosed Claimant with fibromyalgia and noted that she would probably continue to have chronic pain. (CX. 10, pp. 19, 20, 22).

On April 15, 1999, about a week after Claimant's initial workplace injury, she saw Dr. Stewart, who noted that she appeared to be in a lot of pain. Claimant exhibited some muscle spasms, so Dr. Stewart suggested a muscle relaxant. Dr. Stewart told Claimant that her propensity for injury would probably prevent her from working in physically demanding occupations. (CX. 10, p. 17). When Claimant returned on May 4, 1999, she complained of left-sided chest pain and had bronchitic symptoms. On June 7, 1999, Dr. Stewart noted that Claimant was not making progress and physical therapy was making her worse. Upon physical examination, Claimant still had tender areas but not to the same extent. (CX. 10, p. 16).

On July 28, 1999, Claimant continued to complaint of back and shoulder problems. She reported that she had failed a drug test at work. Dr. Stewart theorized that Celebrex might be the cause because ibuprofen can affect the screen for marijuana. No physical changes were noted. Dr. Stewart continued to recommend that she find a different kind of job. On August 5, Claimant told Dr. Stewart that she was unable to work because of back pain and left trapezius pain. Dr. Stewart noted that this area was where Claimant was struck by the pipe. The left trapezius pain was radiating into Claimant's left breast, but Dr. Stewart pointed out that Claimant had experienced breast problems for some time and was suffering from diffuse fibrocystic breast disease. Noting that Claimant was prone to injury, Dr. Stewart reiterated that she should not continue to work in her present environment. When Claimant next saw Dr. Stewart, on August 24, she remained off work. Dr. Stewart planned to send Claimant to Dr. Longnecker to determine whether and when she could return to work. (CX. 10, p. 13).

When Dr. Stewart saw Claimant on September 14, 1999, her complaints remained the same. Dr. Longnecker had recommended physical therapy, but according to Dr. Stewart, workers' compensation had not approved it. Dr. Stewart commented that Claimant had seemed to improve with physical therapy and told Claimant that exercise would help her to deal with the chronic pain. On October 27, Dr. Stewart noted that Claimant had seen Dr. Laseter and Dr. Longnecker and was going to physical therapy, which had helped somewhat with the pain. Claimant had no other changes, and Dr. Stewart felt that since Claimant's medications were not working, she should not continue to take medication for her pain. He reiterated the need for physical exercise. Dr. Stewart concluded that Claimant's chronic pain was due to fibromyalgia because her symptoms were out of proportion to her workplace injury. On November 16, there was no change in either Claimant's condition or Dr. Stewart's advice to her. (CX. 10, p. 12). On December 2, Claimant's condition remained unchanged. (CX. 10, p. 11).

On January 25, 2000, Claimant continued to have left shoulder, arm and neck pain. She remained off work. She had been referred to Dr. Smith for chronic pain management, but this referral was not approved by workers' compensation. (CX. 10, p. 10). On February 23, Dr. Stewart noted that Claimant had suffered from aches and pains off and on for years, all related to various injuries. He concluded that the duration of Claimant's current pain was "inappropriate for the injuries" and that fibromyalgia was probably Claimant's only problem. Claimant continued to have muscle spasms. Since medication had little benefit, Dr. Stewart suggested trigger point injections might help with Claimant's pain. He told her to suggest this course to Dr. Laseter. On March 6, Claimant remained unchanged and requested that Dr. Stewart run more tests. He decided to order an MRI of Claimant's neck, the only test which Claimant had not previously undergone. (CX. 10, p. 9). The MRI, which was taken on March 14, was normal. (CX. 10, p. 8).

On April 6, 2000, Dr. Stewart noted that Dr. Laseter had determined that Claimant had reached maximum medical improvement (MMI). Claimant told Dr. Stewart that she was fine before her workplace accident and would still be working if it had not happened. According to Dr. Stewart, psychological counseling was important for Claimant because she would continue to suffer from chronic pain for the rest of her life. No physical changes were noted. Dr. Stewart expressed his opinion that Claimant could be employed in a more sedentary, less physically demanding occupation. (CX. 10, p.7).

On May 11, 2000, Dr. Stewart noted that Claimant had recently undergone a functional capacity evaluation (FCE). Claimant had received steroid injections from Dr. Longnecker, but she told Dr. Stewart that the injections did not help. Dr. Stewart was unsurprised. He told Claimant that she needed to accept her condition and take control of her decisions. He explained that although fibromyalgia is a disabling condition, Claimant was free to return to work if she really wanted to do so. Dr. Stewart also told Claimant that if she went back to her old job in the shipyard, she would probably end up reinjuring herself. Since Claimant planned to see Dr. Longnecker, Dr. Stewart commented that Dr. Longnecker could decide with Claimant what to do about a return to employment. (CX. 10, p. 6).

On April 3, 2001, Claimant returned to see Dr. Stewart. In the year since her last appointment, she had suffered another workplace injury and eventually left the shipyard. Claimant was working as a substitute teacher. Although she still experienced pain, Dr. Stewart felt that Claimant's coping mechanisms had improved, especially her walking. According to Dr. Stewart, Claimant had finally begun to recognize that fibromyalgia was her main problem. However, Dr.

Stewart felt that Claimant was magnifying her symptoms and noted that she also had done so in the past. Upon physical examination, Claimant had no obvious neurologic deficits, but her fibromyalgia points were tender. Claimant had muscle spasms on her left side. Dr. Stewart planned to see Claimant again on an as needed basis. (CX. 10, p. 4).

On July 23, 2001, Claimant returned to see Dr. Stewart, complaining of back, neck, left arm and left chest pain, as well as numbness in her fingers. Upon physical examination, Claimant had no more tender points than usual. Dr. Stewart wanted Claimant to work on her sleeping patterns, exercise and practice discussing her feelings about her pain. He intended to reevaluate Claimant in five weeks. (CX. 10, p. 2).

Medical Records of John Cope, M.D.

Dr. Cope, an orthopedic surgeon, first saw Claimant on April 21, 1999, about two weeks after her initial workplace accident. At that time, Claimant recounted the history of her injury and complained of pain everywhere, particularly on her left side. Claimant reported no other significant past medical history. Upon physical examination, Dr. Cope noted mild to moderate decreased range of motion in Claimant's neck and left shoulder. Although Claimant exhibited slightly decreased grip strength, her upper and lower extremity neurological examination was otherwise normal with respect to reflex, motor and sensory testing. Although Claimant complained of right elbow pain, she had a full range of motion. Claimant's lumbar motion was slightly limited; a straight leg raising test was negative bilaterally. Dr. Cope reviewed neck, low back and right elbow X-rays, all of which were normal. (CX. 12, p. 16). He diagnosed Claimant with cervical and lumbar strain and a bruised right elbow. Dr. Cope recommended that Claimant remain off work, attend physical therapy and return in two weeks. (CX. 12, p. 17).

On April 29, 1999, Claimant returned to see Dr. Cope. She reported that she had not attended physical therapy because it was not approved by workers' compensation. Dr. Cope noted that Claimant would not look at him and that he could not get her to communicate with him. No physical changes were noted. Dr. Cope got the physical therapy approved and planned to see Claimant again in two weeks. (CX. 12, p. 11).

Claimant next saw Dr. Cope on May 13, 1999. Claimant reported that her low back pain had worsened and sometimes she had trouble sleeping because of the pain, which radiated into her left shoulder and leg. Although Claimant had

mildly decreased range of motion in her neck and low back, her physical examination results were essentially normal. Dr. Cope diagnosed Claimant with chronic cervical strain and chronic lumbar strain. He ordered cervical and lumbar MRIs and planned to see Claimant again once the MRIs were completed. (CX. 12, p. 9).

When Dr. Cope saw Claimant on May 26, 1999, her condition still had not improved. She asked for a change in medications. Other than Claimant's complaints of tenderness to palpation in the neck and low back, her physical examination was normal. Dr. Cope expressed his confusion as to Claimant's status. He noted that Claimant had gone to the emergency room a few times for her pain. Dr. Cope planned to talk to Claimant's physical therapist in hopes of furthering her progress into some work-related activities. He did not anticipate any permanent impairment. Dr. Cope concluded that if Claimant did not improve with physical therapy, he would just do an FCE and release her. (CX. 12, p. 7). On May 27, 1999, Dr. Cope released Claimant to return to work on a light duty basis. Claimant was to avoid bending and stooping as well as over the shoulder work. (CX. 12, p. 6).

Claimant returned to see Dr. Cope on June 3, and her condition remained unchanged. She continued to complaint of neck and back pain. In his assessment, Dr. Cope noted that Claimant's complaints were disproportionate to the known pathology. He recommended an additional opinion for further evaluation. (CX. 12, p. 5). On this same date, a physical therapist noted in a memo to Dr. Cope that evaluation of Claimant had been difficult because of her "marked subjective complaints of pain." Claimant's condition had improved little during the course of physical therapy. (CX. 12, p. 4).

Medical Records of William Crotwell, M.D.

Dr. Crotwell, an orthopedic surgeon, evaluated Claimant for a second opinion on July 9, 1999. Claimant recounted the history of her injury and subsequent medical treatment. Claimant had requested the second opinion because she was unhappy with Dr. Cope, who had released her to light duty on May 26, 1999 and did not feel that she had sustained any permanent physical impairment. (CX. 13, p. 3). Claimant presented with complaints of lumbar spine pain radiating down both legs, cervical spine pain radiating into the head and left shoulder and hand pain. Dr. Crotwell noted that Claimant had a previous history of back problems in 1994 and 1995.

Upon physical examination, Claimant was guarded on the upper extremity examination. She had full range of left shoulder motion and no pain, despite guarding in all directions. When taking Claimant's history and asking her to show him where she was hit with the pipe, Dr. Crotwell observed that Claimant was able to move, bend and put her arms behind her back without any sign of pain, which was "extremely inconsistent" with her later complaints of pain during examination. When Dr. Crotwell asked Claimant to remove her socks before the examination, she was able to bend, flex and remove them without stress. However, she complained of pain when asked to flex during the examination. (CX. 13, p. 4).

Dr. Crotwell noted that Claimant's X-rays and MRIs were all normal. He felt that her lumbar and cervical strains had healed and that her bruised shoulder had healed as well. Dr. Crotwell found no permanent impairment and determined that Claimant could return to regular duty work. He noted that Claimant exhibited multiple inconsistencies and suspected that she was borderline malingering. (CX. 13, p. 5).

On September 10, 1999, Claimant returned to see Dr. Crotwell. She reported that she had sustained another work-related injury on July 28 and was taken off work on August 5. Her complaints remained largely the same. Once again, Claimant was able to bend over and remove her socks without difficulty, but her flexion during examination was limited, which was inconsistent. During the lower examination, Claimant was able to bend her head down and back to the sides, but when Dr. Crotwell tested her range of motion, Claimant's flexion and extension were limited. She had full range of motion in her shoulder. Claimant had tenderness in all directions. No muscle spasms were detected. (CX. 13, p. 1). Dr. Crotwell found no objective evidence to substantiate Claimant's subjective complaints and no permanent impairment. In his opinion, Claimant was able to return to regular duty work. Dr. Crotwell reiterated that he had found multiple inconsistencies with Claimant and believed that she was borderline malingering. (CX. 13, p. 2).

Medical Records of M.F. Longnecker, M.D.

Claimant first saw Dr. Longnecker, an orthopedist, on August 31, 1999. Upon physical examination, Claimant's neck rotation was limited on the left side, but she had full range of motion in her shoulders. She exhibited subjective numbness in the left upper forearm but was neurologically intact. Her cervical spine and left shoulder X-rays were normal. Dr. Longnecker ordered a neck MRI to rule out any intrinsic disc disease, but he suspected that Claimant's injuries were

soft tissue in nature. He sent Claimant to physical therapy and planned to see her again after the MRI. (CX. 11, p. 9).

On September 7, 1999, Claimant saw a physical therapist at Dr. Longnecker's behest. At that time, Claimant reported the history of her April 1999 workplace injury and described her symptoms to the physical therapist. Claimant reported no significant past medical or surgical history. She described her pain as a constant sensation which could not be controlled by medication. Claimant reported that she already had undergone four sessions of physical therapy, which also provided no relief. (CX. 11, p. 11).

Upon physical examination, the physical therapist noted that Claimant had significant muscle guarding in her cervical and upper trapezius region. Her muscles were very tight in the upper trapezius region, especially on the left side. In addition, Claimant was "highly reactive" to any movement in her cervical spine and was "very unwilling" to move secondary to her complaints of pain. The physical therapist anticipated that progress would be slow due to Claimant's reactivity and inability to tolerate movement. Decreasing pain, improving mobility and improving functional status were the long term therapy goals. The physical therapist evaluated Claimant's prognosis as fair. (CX. 11, p. 12).

On May 18, 2000, Dr. Longnecker saw Claimant on a follow-up visit after performing an injection for Claimant's left costa scapular pain. Claimant reported that the injection had temporarily relieved some of her pain but now the pain had completely returned. Dr. Longnecker could find no explanation for the arm numbness that Claimant reported. Her cervical and shoulder MRIs were normal. Dr. Longnecker planned to order an EMG, and he noted that if the EMG showed nothing, he did not know what else he could do for Claimant. He intended to see Claimant again after the EMG. (CX. 11, p. 7).

On May 31, 2000, Claimant returned for a follow-up after the EMG of her left arm. According to Dr. Longnecker, the EMG results were "entirely normal." Claimant reported that she had been lifting some heavy pipe at work on May 23 when she began to experience left shoulder pain, left costa scapular pain radiating to her rib cage and left arm pain. Claimant left work to go to the emergency room, where she received an injection. Dr. Longnecker found no changes upon physical examination and felt that Claimant had probably only pulled some muscles. He told Claimant that she should seek a job with less physical requirements, since she continued to hurt herself at work in the shipyard. Dr. Longnecker took Claimant

off work for two weeks and sent her to physical therapy. He planned to see her back in two weeks. (CX. 11, p. 4).

Claimant next saw Dr. Longnecker on June 14, 2000. Dr. Longnecker explained that although he had given Claimant the benefit of the doubt for two weeks, he had reviewed Dr. Laseter's report in the meantime, which concluded that there was nothing wrong with Claimant other than soft tissue injuries which probably were magnified. Dr. Longnecker agreed with this assessment. He felt that Claimant's injuries were exaggerated and had been aggravated by working in the shipyard. In Dr. Longnecker's opinion, Claimant should seek other employment. He also opined that Claimant could recover from her problems, "if she will give it a chance." Dr. Longnecker concluded that from an orthopedic standpoint, he had nothing further to offer Claimant. (CX. 11, p. 3). On June 15, Dr. Longnecker reiterated that he could find no objective findings to substantiate Claimant's complaints and that he could do nothing else for her. Dr. Longnecker felt that Claimant was fit for return to full duty. (CX. 11, p. 1).

Medical Records of Jeffrey T. Laseter, M.D.

Dr. Laseter, a pain management specialist, saw Claimant on November 9, 1999. He reviewed the history of Claimant's April 1999 workplace accident and noted that she had been struggling with pain ever since the accident occurred. Neither pain medication nor physical therapy helped with the pain. Upon physical examination, Claimant exhibited tenderness in her cervical paraspinous musculature, including the trapezius muscles. Claimant had full range of motion in flexion and extension and rotation, although the rotation apparently caused some pain. Dr. Laseter diagnosed Claimant with fibromyalgia. He instructed her to continue taking Celebrex and prescribed another medication as well. He planned to set Claimant up with a home muscle stimulation program. (CX. 16, p. 4).

Dr. Laseter determined that Claimant had reached MMI from her July 28, 1999 injury as of February 24, 2000 with no permanent impairment. He suggested that Claimant work at light duty and only lift up to twenty pounds occasionally and ten pounds frequently. Dr. Laseter, who still felt that Claimant suffered from fibromyalgia, noted that Claimant showed multiple inconsistencies during examination. (CX. 16, p. 2).

On May 5, 2000, Dr. Laseter noted that Claimant had missed a scheduled appointment that day. He recounted her injury history and course of treatment. After Dr. Laseter placed Claimant at light duty, she had requested specific

restrictions, so he ordered an FCE, which was performed on May 1. The results indicated that Claimant exerted submaximal effort during the evaluation. In additon, Claimant demonstrated inconsistent releasing and holding of a body part, which had no neuro-anatomical basis. Claimant's Blankenship system behavior profile indicated inappropriate illness behavior disproportionate to her impairment. Claimant also exhibited symptom magnification. For example, during the test, Claimant refused to do repetitive bending and squatting, claiming that she was unable to do so. However, she was observed taking her shoes on and off several times, an activity which involved repetitive bending and stooping. Dr. Laseter concluded that although Claimant might suffer from fibromyalgia, she had significant symptom magnification illness behavior as well as psychological factors affecting her condition. Dr. Laseter once again recommended that Claimant be placed at MMI and returned to regular duty. (CX. 16, p. 1).

Medical Records of Singing River Hospital

On February 29, 2000, Claimant was referred by Dr. Laseter to a pain psychology consultation with Dr. Steve Smith, a licensed clinical psychologist. During the consultation, Dr. Smith reviewed Claimant's social and medical history. (CX. 14, p. 19). Dr. Smith observed that Claimant exhibited mild to moderate symptoms of depression which she related to her injury and current physical limitations. (CX. 14, p. 20). Although Claimant failed to complete the MMPI-II, her score indicated an apparent propensity toward excessive focus on and sensitivity to physical symptoms and pain. Dr. Smith's diagnostic impression was probable pain disorder associated with psychological factors and general medical condition and adjustment disorder with depressed mood. Noting that Claimant had cancelled her appointment in which she was to complete the pain psychology evaluation and had not rescheduled, Dr. Smith recommended that she return to complete this testing so that the preliminary diagnosis could be further defined. Dr. Smith suggested that Claimant would probably benefit from antidepressant medication and participation in supportive psychotherapy. (CX. 14, p. 21).

Labor Market Survey by Tommy Sanders, C.R.C.

On April 17, 2000, Mr. Sanders, a vocational rehabilitation counselor, completed a hypothetical vocational assessment/labor market survey regarding Claimant. (EX. 26). Mr. Sanders reviewed Claimant's medical history, including her 1993 car accident and her April and July 1999 workplace accidents. (EX. 26, pp. 1-2). He also reviewed Claimant's educational and employment history. (EX. 26, p. 2).

Based on Claimant's hypothetical residual employability profile, Mr. Sanders found three jobs currently available for Claimant in the local area. Texaco Convenience Store in Moss Point was accepting applications for three full and part time clerks to work twenty to thirty-eight hours weekly. Wages started at $5.15 to $5.40, depending upon the shift. Physical requirements of this job included occasional lifting of five to ten pounds, occasional sitting, frequent standing/handling and occasional bending/stooping. Duties included operating the cash register, accepting payment for purchases, mopping, sweeping and emptying the trash once per shift, picking up trash in the parking lot and straightening shelves. Employees also had to stock coolers, which could be done at the employee's discretion, i.e. one six pack at a time. Training was provided.

Hampton Inn in Moss Point was accepting applications for a breakfast hostess. Wages started at $5.75 per hour for 30+ hours per week. Physical requirements included occasional lifting of five to fifteen pounds, occasional bending/stooping and frequent standing and walking. Duties included setting up an area with pastries, coffee, milk and juices, cleaning tables and counters and sweeping. Training was provided.

Heilig Meyers in Pascagoula was accepting applications for a customer service representative. Wages started at $6 per hour for a forty hour work week. Physical requirements included occasional lifting of five to ten pounds. Duties included general office duties. Training on answering the phone, taking messages, contacting past due accounts, accepting credit and term lease applications and maintaining records of payment was provided.

Mr. Sanders also found three jobs which were retroactively available to Claimant on or about February 24, 2000, the day that Dr. Laseter determined that Claimant had reached MMI. Pinkerton's Security hired a gate guard with entry wages of $5.90 per hour, thirty-two to forty hours weekly. Chevron Convenience Stores hired three to five cashiers with entry wages of $5.25 per hour, twenty to forty hours weekly. Exxon Convenience Stores hired cashiers with entry wages of $5 per hour, twenty to forty hours weekly. (EX. 26, p. 3).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir.

1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Newman, 460 F.2d 1241, 1243 (5th Cir. 1972).

The evidence in this case suggests that Claimant is a less than credible witness, particularly with regard to her complaints of pain after each of the four injuries in this case. According to the medical evidence, Claimant sustained some back injuries in a 1993 car accident and remained off work for over a year. In treating Claimant for this accident, Dr. Stewart diagnosed her with fibromyalgia and advised that she would suffer from chronic pain for the rest of her life. In the course of 1999 and 2000, Claimant sustained four workplace injuries. Despite her continued complaints of pain during this period of time, every doctor who examined Claimant eventually concluded that there was nothing wrong with her, although a few doctors noted the preexisting fibromyalgia. Every doctor noted that Claimant's subjective symptoms were disproportionate to the objective findings. In addition, at least two doctors found objective evidence during their examinations that Claimant was magnifying her symptoms. Because of the numerous discrepancies between Claimant's complaints and the objective medical evidence, I find that Claimant's credibility is suspect, and as such, I will place less weight on her subjective complaints than I otherwise would.

Nature and Extent

Causation is not an issue in this case, as the Parties have stipulated to the occurrence of each of the four work-related injuries in question. Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the

availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American

Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work. Walters v. Ingalls Shipbldg., Inc., 31 BRBS 75 (CRT) (5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breeching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); see also Harrod v. Newport News Shipbldg. & Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbldg., Inc., 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

In this case, Claimant sustained four separate injuries at work over the course of 1999 and 2000. Each injury and resulting period of disability, if any, will be evaluated in turn.

April 7, 1999 Injury and Period of Disability

Claimant's first injury occurred on April 7, 1999, when she was hit in the head, neck, left shoulder and back by a large pipe. She was treated by Dr. Stewart and Dr. Cope. According to the medical records of both doctors, Claimant's condition remained largely unchanged between April and June 1999. By May 26, 1999, although Claimant continued to complain of pain, Dr. Cope could find

nothing objectively wrong with Claimant. Dr. Cope released Claimant to return to work with some restrictions on May 27. Because of a strike at the shipyard, Claimant was unable to return to work until July 27, 1999. Employer has not shown that any suitable employment was available to Claimant when she was released to restricted duty on May 27, 1999. However, by July 9 Dr. Crotwell determined that Claimant had no permanent impairment and was able to return to regular duty work. Considering all the objective medical evidence that was presented, I find Dr. Crotwell's opinion to be accurate. Thus, I find that the period of temporary total disability for this first injury spanned from April 7, 1999, to July 9, 1999. There was no permanent disability from this first injury.

July 28, 1999 Injury and Period of Disability

Because of a strike at the shipyard, Claimant was unable to return to work until July 27, 1999. Claimant testified that her assigned duty that day–to unbolt valves, pick them up and remove them from a ship–were within the restrictions given by Dr. Cope. Nonetheless, Claimant began experiencing pain while working, and she reported to the shipyard hospital on July 28. Claimant underwent a post-accident drug screen and tested positive for marijuana, so she was placed on a non-industrial leave of absence until such time as a second drug test came up negative. Claimant retook the drug test on August 4, 1999, and tested negative. At that point, Claimant would have been able to return to work on a probationary basis. However, Claimant actually remained off work until May 2000.

During the nine months that Claimant remained off work, she treated with Dr. Stewart, Dr. Longnecker, Dr. Crotwell and Dr. Laseter. On the day that Claimant left work and failed her drug test, July 28, 1999, Dr. Stewart examined her and noted no physical changes in her condition, although he did suggest that she find another, less strenuous job because of her propensity for injury. On August 5, the physical problems mentioned by Dr. Stewart related mainly to Claimant's pre-existing fibrocystic breast disease. When Claimant first saw Dr. Longnecker on August 31, her cervical spine and left shoulder X-rays were normal and she had no neurological injuries. On September 10, Dr. Crotwell could find no objective evidence to substantiate Claimant's subjective complaints, nor could he find any permanent impairment. In fact, Dr. Crotwell found multiple inconsistencies between Claimant's complaints and the objective medical findings and believed that she was borderline malingering. Dr. Stewart's medical records indicate that by October 27, 1999, Claimant's condition had stabilized. At that point, Dr. Stewart concluded that Claimant's chronic pain must be due to pre-existing fibromyalgia, since her symptoms were out of proportion to her injury.

When Dr. Laseter saw Claimant on November 9, 1999, he diagnosed Claimant with fibromyalgia and also noted the multiple inconsistencies between Claimant's subjective complaints and the objective findings during physical examination. In any case, Dr. Laseter did not attribute Claimant's pain to anything other than fibromyalgia.

Although Dr. Laseter did not make a determination as to MMI until February 24, 2000, when he found that Claimant had no permanent impairment and released her to work with some light duty restrictions, the medical records indicate that Claimant's condition had stabilized at least as early as September 10, 1999 and possibly even on the day that she left work and failed the drug test. Despite Claimant's general lack of credibility with regard to her complaints of pain, both Parties agree that she did suffer a workplace injury on July 28, 1999, and I am willing to give Claimant the benefit of the doubt that she did suffer a temporary aggravation in her condition. However, although Dr. Stewart apparently gave Claimant the benefit of the doubt with regard to the credibility of her complaints, his reasons for taking her off work in the first place had largely to do with her pre-existing fibromyalgia as well as Dr. Stewart's concern about Claimant's propensity for injury. In other words, Dr. Stewart's decision to keep Claimant off work indefinitely had nothing to do with her July 28 injury/aggravation. Consequently, I find that Claimant reached MMI with regard to this temporary aggravation and was able to return to work as of August 5, 1999, the day after her negative drug test enabled her to return to work on a probationary basis. I find that the period of temporary total disability from this second injury spanned from July 28, 1999, to August 5, 1999. Once again, there was no permanent disability associated with this injury.

May 23, 2000 Injury and Period of Disability

Claimant returned to work in May 2000, after undergoing an FCE which she failed to complete. Claimant was assigned a light duty job in which she rode a bicycle and transported pipes around the shipyard. Claimant continued to work until May 23, 2000, when she stopped work and went to the shipyard hospital, claiming that she was in pain. Claimant was not treated at the shipyard hospital, and she apparently did not seek medical treatment until her appointment with Dr. Longnecker on May 31, over a week after her injury. Dr. Longnecker found no physical changes in Claimant's condition and suspected that she had probably only pulled some muscles. Dr. Longnecker took Claimant off work for two weeks and sent her to physical therapy, but when he reevaluated her, he agreed with Dr.

Laseter's assessment that there was nothing wrong with Claimant other than soft tissue injuries which were probably magnified.

Although Dr. Longnecker apparently gave Claimant the benefit of the doubt when he took her off work for two weeks, there was no objective medical evidence to indicate that Claimant's one-day aggravation of May 23 still persisted on May 31. Claimant's lack of credibility with regard to her complaints of pain makes it difficult to justify any award of temporary total disability, even for the two additional weeks after she had already been absent from work for over a week following the aggravation. Accordingly, I find that Claimant is not entitled to any compensation benefits for the May 23, 2000 injury/aggravation.

June 28, 2000 Injury and Period of Disability

While cutting some pipe at work, Claimant cut her left index finger and received some stitches. Although Claimant testified that a pain in her arms and back caused her to cut her finger, she did not seek any medical treatment other than receiving stitches, nor did she miss any work because of this injury. I find that Claimant is not entitled to any temporary total disability benefits for the June 28, 2000 injury.

I further find the evidence is clear that Employer provided suitable employment for Claimant in its facility each time that she returned to work. Although several doctors advised Claimant to avoid shipyard work because of her propensity for injury and her continued complaints of pain, none of them found any permanent impairment. Whenever Claimant was given light duty restrictions, she was assigned light duty work. Claimant never testified that she was worked outside her restrictions. It was within Claimant's own discretion to leave shipyard employment if she felt physically unable to do the work. In addition, even if Employer had not continued to work with Claimant's restrictions, Employer provided evidence that suitable alternative employment existed for Claimant in the local area as of February 24, 2000.

Claimant was terminated from her employment after failing a drug test while on probation, a reason which was wholly unrelated to her workplace injuries. At that point, Employer had no further obligation to pay compensation benefits, even if Claimant had established that she suffered from a disability. Although Claimant earns less at her current job as a substitute teacher than she did as a pipe fitter, Employer is not responsible for paying the difference in these wages, since

Claimant was terminated from her employ for a reason unrelated to her alleged disability.

Average Weekly Wage

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. § 910. Section 10(a) applies where an employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Gatlin, 936 F.2d at 21, 25 BRBS at 28 (CRT); Duncan-Harrelson, 686 F.2d at 1341; Duncan, 24 BRBS at 135; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

When there is insufficient evidence in the record to make a determination of average weekly wage (AWW) under either subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991).

Under Section 6(b)(2) of the Act, the minimum level of benefits is the claimant's AWW or fifty percent of the national AWW, whichever is less. The basic formula for calculating benefits, namely 66 2/3 percent of the worker's actual AWW, remains unchanged. Director, OWCP v. Bath Iron Works Corp., 885 F.2d

983, 991 (1st Cir. 1989). This minimum applies only to total disability compensation. Smith v. Paul Bros. Oldsmobile Co., 16 BRBS 57 (1983); Stutz v. Independent Stevedore Co., 3 BRBS 72 (1975). The minimum rate applies to both permanent and temporary total disability. Brandt v. Stidham Tire Co., 16 BRBS 277 (1984), rev'd on other grounds, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986).

In this case, both Parties agree that § 10(c) should be used to calculate Claimant's average weekly wage at the time of her workplace accidents. Claimant has argued that her average weekly wage should be calculated by multiplying her hourly wage at the time of each injury by forty hours per week. However, as Employer has pointed out, Claimant did not always work a forty hour week in the year before her first injury. Employer argues that Claimant's average weekly wage is properly calculated by dividing her total earnings in the fifty-two week period before her first injury by fifty-two. I agree with Employer that this calculation best reflects Claimant's average weekly wage at the time of her first injury. Hence, since Claimant's total earnings during this fifty-two week period totaled $20,732.31, her average weekly wage at the time of the April 7, 1999 injury was $398.70, with a corresponding compensation rate of $265.93. (EX. 21). Since Employer failed to round its numbers accordingly when calculating the average weekly wage, Employer now owes Claimant the difference between the compensation rate paid and the actual compensation rate, a matter of a few cents per week, plus interest. Employer shall pay Claimant temporary total disability benefits for the time period from April 7, 1999, through May 27, 1999, based on an average weekly wage of $398.70, with a corresponding compensation rate of $265.93.

As to the compensation rate for Claimant's second injury, Employer argues that essentially the same formula should be applied to calculate the average weekly wage. Employer notes that Claimant did not work every week during fifty-two week period before her second injury, nor did she work a full forty hours each week. In this case, Employer's calculation involves dividing Claimant's total earnings over the fifty-two week period by forty-six, taking into account six weeks during which Claimant was off work and there was a strike at the shipyard. Since Claimant's total earnings during this fifty-two week period totaled $17,639.44, her average weekly wage at the time of the July 28, 1999 injury was $383.47, with a corresponding compensation rate of $255.77. (EX. 22). Employer shall pay Claimant temporary total disability benefits for the time period from July 28, 1999, through August 5, 1999, based on an average weekly wage of $383.47, with a corresponding compensation rate of $255.77.

Since Claimant is entitled to no compensation for either her third or fourth workplace injury, I need not reach the issue of calculating applicable average weekly wage for these injuries. I agree with Employer, however, that if any total disability compensation benefits had been due, Section 6(b)(2) of the Act would apply, since Claimant did not work substantially the whole of the year prior to these injuries. (EX. 23).

Medical Expenses

Section 7 of the LHWCA provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette W. Corp., 20 BRBS 184, 187.

It appears from the medical and testimonial evidence in this case that all medical expenses related to Claimant's first, second and third injuries have been paid by Employer. Claimant testified that Employer does not pay for her current treatment with Dr. Stewart. Even before Claimant's third and fourth workplace injuries, Dr. Stewart felt that Claimant's main problem was her preexisting fibromyalgia, and his treatment was focused upon helping her to accept her condition and take control of her decisions. Dr. Stewart's own medical records from the year after Claimant's injury reiterate his opinion that Claimant's preexisting fibromyalgia is her main problem, with little mention of her previous workplace injuries other than an observation that Claimant continues to focus upon them. Because Claimant has failed to provide any evidence that her current treatment with Dr. Stewart is necessary for a work-related condition, I find that Employer is not responsible for the cost of any medical expenses associated with this treatment.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability benefits for the time period from April 7, 1999, through July 7, 1999, based on an average weekly wage of $398.70, with a corresponding compensation rate of $265.93.

2. Employer shall pay Claimant temporary total disability benefits for the time period from July 28, 1999, through August 5, 1999, based on an average weekly wage of $383.47, with a corresponding compensation rate of $255.77.

3. Employer shall receive a credit for benefits and wages paid.

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

5. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have twenty days to respond.

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 23rd day of September, 2003, at Metairie, Louisiana.

A

LARRY W. PRICE
Administrative Law Judge